IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1000 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE R.H.SHUKLA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? YES

2 To be referred to the Reporter or not ? YES

3 Whether their Lordships wish to see the fair copy of the judgment ? NO

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? NO

5 Whether it is to be circulated to the civil judge ? NO

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VARISALI MOHAMMAD ISRAIL - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
Ms Rekha Kapadia, learned advocate appointed by Legal Aid Committee for Appellant
Mr. R.C. Kodekar, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE R.H.SHUKLA

Date : 27 /12 /2007

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.H.SHUKLA)

The present appeal is directed against the judgement and order dated 7.10.1998 passed by the learned Additional Sessions Judge, Ahmedabad (Rural), Mirzapur, Ahmedabad, in Sessions Case No. 116 of 1994 recording the conviction of appellant original accused No. 1 (husband) for the offence under Section 302 and 498A of the Indian Penal Code imposing sentence of imprisonment for life and imposing a fine of Rs. 10,000/- and in default to undergo rigorous imprisonment for six months. In view of the sentence imposed for offences under Section 302 of the Indian Penal Code, no separate sentence has been awarded for offence under Section 498A of IPC. The learned Sessions Judge has acquitted original accused No. 2 (mother-in-law) of the charges for both the offences.

2. The short facts of the case stated are that the appellant-original accused No. 1 is the husband of the deceased and accused No. 2 is mother-in-law. The case of the prosecution is that the deceased Sahanazbanu was harassed/abused by accused No. 1. It is alleged that on 17.2.1994 at about 3.30 p.m. the accused had set ablaze the

deceased Sahanazbanu (wife) by pouring kerosene after denuding her in the house at Bakramandi Ranip, Ahmedabad. Therefore, complaint was lodged by the Head Constable Kalaji Mangalji on 17.2.1994. Offence was registered being FIR - C.R. No. I-28 of 1994 on the basis of vardhi Exh. 23.

3. On the basis of the complaint/FIR, investigation was carried out. After the investigation was over, charge-sheet was submitted and the learned Judicial Magistrate First Class after ascertaining as regards papers are given to the accused, committed the case to the Court of Sessions as the offence under Section 302 of the Indian Penal Code was triable by the Court of Sessions by committal order Exh. 7.

4. After ascertaining as regards the papers made available to the accused, the learned Sessions Judge framed the charges for offence under Sections 302 and 498A of the Indian Penal Code against both the accused and proceeded with

the trial. In order bring home the charge levelled against the accused persons, the prosecution examined the following witnesses:

S.No.	Name	Prosecution Witness	Exh.
1.	Dr. Jayandra Ratilal Modi	PW-1	113
2.	Karaji Magraji	PW-2	185
3.	Sharafatali Shokatali	PW-3	191
4.	Shanazbanu Liyakatali Pathan	PW-4	207
5.	Arvindbhai Hamichand Patel	PW-5	213
6.	Haran Rasidabdul Shaikh	PW-6	229
7.	Sabanabanu Varisali	PW-7	233
8.	Pravinbhai Shankarbhai	PW-8	237
9.	Dr Vinajykrav Vasudev Patil	PW-9	243
10.	Baldevbhai Rambhai Patel	PW-10	269
11.	Harishchandrasinh Ramsinh Puvar	PW-11	291

5. The prosecution has also produced documentary evidence with the list at Exh. 15.

6. After recording of the evidence was over, the learned Additional Sessions Judge, Ahmedabad (Rural) at Mirzapur recorded further statement of the accused under Section 313 of the Cr.P.C. In the further statement, the accused has denied that the deceased wife had given the dying declaration in a fit and conscious state of mind. In the further statement, the accused has not stated about the suicide having been committed by the victim.

7. After hearing the learned Public Prosecutor as well as learned advocate Ms. Rekha Kapadia, appointed by the Legal Aid Committee for the appellant accused No. 1 convicted for offence under Sections 498A and 302 of Indian Penal Code and sentenced to imprisonment for life. However, the learned Sessions Judge acquitted accused No. 2 (mother-in-law) for the charges for both offences.

8. It is this judgement which has been challenged before this Court mainly on the ground that the dying declaration recorded is not

reliable as it does not bear the endorsement of the doctor about the condition of the patient i.e. deceased sahanazbanu. Learned advocate Ms. Rekha Kapadia for accused No. 1 referred to the deposition of Dr. Jayandra Ratilal Modi, PW-1, at Exh. 13 that he has not stated about having made any endorsement. He also referred to deposition of Vinayak Rao, PW-9, Exh. 29 who performed the postmortem and submitted that it cannot be specifically opined whether it is a case of suicide or homicide. The learned advocate has submitted that as stated by doctor it could be a suicide or homicidal death. Therefore, learned advocate Ms. Rekha Kapadia submitted that whether the dying declaration at Exh. 36 can be relied upon or not is required to be examined. There is no endorsement on the dying declaration about the condition of the deceased Sahanazbanu. Learned advocate Ms. Rekha Kapadia strenuously submitted that it is necessary that the endorsement about th condition of the patient is made by the doctor before the dying declaration is recorded and

dying declaration at Exh. 36 does not bear any endorsement of the doctor about the condition of the deceased Sahanazbanu. It was strongly submitted that such dying declaration cannot be relied on more particularly when there are more than one dying declaration in the form of statement before the police. Learned advocate Ms. Rekha Kapadia has also referred to and relied on the deposition of Baldevbhai Rambhai Patel, Executive Magistrate, PW 10 at Exh. 35 and submitted that it would transpire from the evidence that it has been admitted by him in the cross-examination that he had not obtained any endorsement of the doctor regarding the condition of the patient as to whether she is in a fit condition to give the dying declaration. He has also admitted that normally such an endorsement is made on the dying declaration and in the present case the dying declaration at Exh. 36 no such endorsement is admittedly made. Further, it was further submitted that dying declaration has not been recorded in the presence of doctor.

Learned advocate Ms. Rekha Kapadia also submitted that thumb impression on the dying declaration is also not clear and therefore also the dying declaration cannot be relied. Learned advocate Ms. Rekha Kapadia emphasised and submitted that it is unsafe to rely on such dying declaration.

9. Learned advocate Ms. Rekha Kapadia submitted that there is no evidence and the Executive Magistrate, Baldevbhai Rambhai Patel PW-10 at Exh. 35 in the cross-examination has admitted that he had not taken such endorsement of the condition of the patient whether she is conscious or not.

10. Learned advocate Ms. Rekha Kapadia further referred to the deposition of Farunrashid Abdul Shaikh PW-6 at Exh. 24 and submitted that he is the witness who is said to have tried to extinguish the fire of the decased. However, Ms. Rekha Kapadia submitted that his evidence is also not believable that he would first visit the house where there is a quarrel and then came back and again when he has seen the deceased with fire

outside the house, he poured water. It was further submitted that the prosecution has also examined Shabanabanu Varisali PW-7 at Exh. 25 (daughter) who is minor (child witness). It was submitted that she is the child witness and daughter of the deceased and accused No. 1 and her evidence has been rightly been not believed or accepted by the learned Sessions Judge inasmuch as she has tried to implicate accused No. 2 (mother-in-law) also and has improvised . Therefore, it was submitted that as a tutor witness her evidence has not been believed though she has tried to support the prosecution case. Therefore, learned advocate Ms. Rekha Kapadia submitted that there is no other evidence except dying declaration before the police as well as the dying declaration recorded by the Executive Magistrate. It was submitted that the dying declaration at Exh. 36 recorded by the Executive Magistrate, as submitted, is not reliable evidence and therefore the doctor who has performed the postmortem has given opinion that

it could be a suicide or homicidal death and therefore the benefit should be given to accused No. 1 when he has not rule out the possibility of the suicide.

11. Learned advocate Ms. Rekha Kapadia submitted that consistently defence has been raised before the trial Court that it was the case of suicide and it has not been believed or accepted by the learned Sessions Judge. However, in the light of the submissions and infirmities pointed out in the dying declaration it cannot be relied on. Further it has been submitted that even if such a dying declaration could be relied on it would require further corroboration which is not there and therefore the conviction cannot be based solely on the dying declaration and benefit of doubt should be given to the accused.

12. Mr. R.C. Kodekar, learned A.P.P. Has submitted that the trial Court has properly appreciated the evidence and has not relied on the deposition of the child witness where she has improvised and has tried to implicate mother-in-

law. The trial Court has rightly not accepted that evidence and she has been acquitted. It was submitted that the dying declaration can form the basis of conviction if it is reliable. Learned A.P.P. Mr. R.C. Kodekar submitted that though the endorsement of the doctor may not be there on the dying declaration itself but doctor has made such endorsement that the patient is conscious in the yadi given to the Executive Magistrate which is at Exh. 37. He pointedly referred to deposition of Executive Magistrate and submitted that the Executive Magistrate Baldevbhai Rambhai Patel PW-10 in his deposition at Exh. 35 has specifically stated in the cross examination that he has not obtained the endorsement on the dying declaration at Exh. 36. However, he has stated that he had obtained such an endorsement on the yadi at Exh. 37. Further he has clarified and stated that he consulted the doctor but as the doctor was busy dying declaration could not be recorded in his presence and he had ascertained from the doctor about the condition of the patient. Therefore,

merely because the endorsement is not there on the dying declaration by itself would not make the dying declaration unreliable. Learned A.P.P. has also drawn the attention of the Court to the statement of the deceased which is in the form of dying declaration before the police at Exh. 44 wherein she has narrated bout the incident and she has specifically stated that she was denuded on 17.2.1994 at 3.30 p.m. in her house by the husband accused No. 1 and set ablaze by pouring kerosene, thereafter she ran outside and the witness Harishchandrasing Ramsing Puvar PW-11 at Exh. 39 who is neighbour had poured water on her. Learned APP submitted that the submission afterwards a fire or if she was set ablaze it would have some marks in the house or the room itself and other some article which have been there. However, learned PP submitted that she has specifically stated that after she was set ablaze, ran outside and the premises of the house was only room and she immediately ran out and went to the nearby place near bathroom and the

independent witness Harishchandrasing Ramsing Puvar who is neighbour poured water. Further in the hospital itself she has also narrated as to what transpired before the sister-in-law Shanazbanu Liyakatali Pathan she has been examined as PW-4 Exh. 207 and she has in her deposition specifically stated that the deceased has narrated as to what had transpired that her (deceased) husband after making her nude set her ablaze. This would also be a dying declaration. Therefore, learned APP submitted that there are consistent dying declaration oral as well as recorded by the Executive Magistrate. Learned APP Mr. R.C. Kodekar referred to th deposition of the Executive Magistrate Baldevbhai Rambhai Patel PW-10 at Exh. 35 and submitted that he has also stated that the history was given by the deceased patient herself it may not be believed that she was not conscious enough/in a fit condition to give the dying declaration.

13. In view of these rival submissions it is required to be appreciated the submissions made

by the learned advocate for the accused emphasising on the reliability of the dying declaration. However, for that purpose the dying declaration at Exh. 36 is required to be seen and yadi at Exh. 37 to the Executive Magistrate bears the endorsement “patient is conscious - 6.00 p.m. Date 17.2.94”. Further there is another endorsement on the yadi “patient is conscious – 9.04 p.m. Dated 17.2.94”. This endorsement is obtained by the Executive Magistrate. It is clearly stated in his deposition at Exh. 35 that after reaching the hospital and ascertaining opinion from the doctor that the patient is conscious he started recording dying declaration. Moreover, the case papers produced by Dr. Jayendra Ratilal Modi clearly refers to the aspect about the condition of the patient/deceased Sahanazbanu inasmuch as there is an endorsement made in the case paper while recording the history: “Alleged. H/o Thermal burns. Pt. Concious and history given by herself.” “Mere Dhani ne pahle mar mark badh may

kerosene dalker jala diya”. This endorsement is made by the doctor at the time when the deceased was brought to the hospital at 2.30 p.m. and the time is also mentioned. Thereafter on 17.2.1994 when the recording of the dying declaration was started there is a specific note/endorsement with date and time 17.2.1994 6.00 p.m. “Dying declaration started at 6.00 p.m. Patient conscious”. The doctor has put his signature on the case paper. Again on 17.2.1994 at 9.04 p.m. when the recording of the dying declaration was over, the endorsement is to be found dying declaration - 9.04 p.m. Patient conscious and there is signature made by the doctor. Further from the case paper that there is a note or the endorsement with regard to the condition of the patient on the next day.

14. Thereafter he has recorded time of completion of dying declaration also. Therefore, the deposition of the Executive Magistrate PW-10 at Exh. 35 is corroborated by the medical evidence also merely because he has not obtained

the endorsement on the dying declaration itself about the condition of the deceased by itself would not make the dying declaration unreliable. It is well settled that the dying declaration can be relied on if it does not suffer any basic infirmity and inspires confidence. It has been observed in a catena of pronouncement of the Hon'ble Apex Court that the general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the person is at the point of death and when every hope of of his world is gone. At that point of time every motive to falsehood is silenced and the mind is induced by the most powerful consideration to speak the truth such a solemn situation is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice. A dying declaration, therefore, enjoys almost sacrosanct status as a piece of evidence coming as it does from the mouth of the deceased victim. Once the statement of dying person and the

evidence of the witnesses testifying to the same passes the test of careful scrutiny of the courts, it becomes very important and reliable piece of evidence and the Court is satisfied that the dying declaration is true and free from embellishment such a dying declaration by itself can be sufficient for recording conviction without without looking for any corroboration. A Division Bench of this Court in its judgement in the case of STATE VS. KOLI CHUNILAL SAVJI reported in 2000(4) GLR 3277 has, after referring to the earlier judgement of the Hon'ble Apex Court, discussed about the test and observed “that Supreme Court emphasised that shortness of the statement itself guarantees truth. One of the important tests of reliability of dying declaration that the person who recorded it must be satisfied that the deceased was in a fit state of mind. Generally, the following three tests have been devised in judicial pronouncement in order to answer the question whether the dying declaration is true:

(i) Was the victim in a position to identify the assailant(s)?

(ii)Whether the version narrated by the victim is intrinsically sound and accords with probabilities?

(iii) Whether any material part is proved to be false by other reliable evidence?”

15. Moreover, the contention which has been raised and much emphasised by learned advocate Ms. Rekha Kapadia that dying declaration does not bear the endorsement of the doctor about th condition of the deceased patient and therefore is not reliable has been considered and dealt with by the Hon'ble Apex Court in its judgement in the case of KOLI CHUNILAL SAVJI & ANR. VS. STATE (reported in 2000(4) GLR 3298 and it clearly answers the contention raised by learned advocate Ms. Rekha Kapadia that the dying

declaration ought not to be relied on as there was no endorsement of the doctor on the dying declaration itself and that the doctor was not examined and the said contention was negatived by the Hon'ble Apex Court. It has been observed that “the Court is unable to accept the submission of the learned counsel that two dying declaration cannot be relied upon as the doctor has not been examined and the doctor has not made any endorsement on the dying declaration with regard to the condition of the deceased, the Magistrate who recorded the dying declaration has been examined as a witness. She has categorically stated in her evidence that as soon as she reached the hospital in the surgical ward of Dr. Shukla, she told the doctor on duty that she is required to take the statement of Dhanuben and she showed the doctor the police yadi. The doctor then introduced her to Dhanuben and when she asked the doctor about the condition of Dhanuben, the said doctor categorically stated that Dhanuben was in a conscious condition. It further

appears from her evidence that though there has been no endorsement on the dying declaration recorded by the Magistrate with regard to the condition of the patient but there has been an endorsement on police yadi, indicating that Dhanuben was fully conscious. In view of the aforesaid evidence of the Magistrate and in view of the of doctor on the police yadi and no reason having been ascribed as to why the Magistrate would try to help the prosecution, the Court sees no justification in the comments of the learned Counsel that the dying declaration should not be relied upon in the absence of the endorsement of the doctor thereon.”. This clearly answers the contention raised by the learned advocate for the defence.

16. Moreover, the Hon'ble Apex Court in a judgement in the case of LAXMAN VS. STATE OF MAHARASHTRA reported 2003(1) GLR 1 (FB) has dealt with this aspect of reliability of dying declaration and the endorsement of the doctor

recording that the patient is conscious and also considered the question as to whether further certification that the patient was in a fit state of mind to make the dying declaration is necessary and the question has been answered in the negative. The Hon'ble Apex Court has discussed and dealt with this aspect at length and relying upon the earlier judgement reported in 2000(4) GLR 3298 has specifically focused on the same issue as raised in the present case by the learned advocate for the accused and observed in para 4 on page 4 in the judgement in the case of LAXMAN VS. STATE OF MAHARASHTRA (supra) as under:

> “Bearing in mind the aforesaid principle, let us now examine the two decisions of the Court which persuaded the Bench to make the reference to the Constitution Bench. In PAPARAMBAKA ROSAMMA VS. STATE OF A.P. 1999 (7) SCC 695 the dying declaration in question had been recorded

by the Judicial Magistrate and the Magistrate had made a note that on the basis of answers elicited from the declarant to the questions put he was satisfied that the deceased is in a fit disposing state of mind to make a declaration. The Doctor had appended a certificate to the effect that the patient was conscious while recording the statement, yet the Court came to the conclusion that it would not be safe to accept the dying declaration as true and genuine and was made when the injured was in a fit state of mind since the certificate of the Doctor was only to the effect that the patient is conscious while recording the statement. Apart from the aforesaid conclusion in law the Court had also found serious lacunae and ultimately did not accept the dying declaration recorded by the Magistrate. In the latter decision of this Court in KOLI CHUNILAL

SAVJI VS. STATE OF GUJARAT (supra), it was held that the ultimate rest is whether whether the dying declaration can be held to be a truthful one and voluntarily given. It was further held that before recording the declaration the officer concerned must find that the declarant was in a fit condition to make the statement in question. The Court relied upon the earlier decision an in RAVI CHANDER VS. STATE OF PUNJAB, 1998(9) SCC 303 wherein it had been observed that for not examining by the doctor the dying declaration recorded by the Executive Magistrate and the dying declaration orally made need not be doubted. The Magistrate being a disinterested witness and a responsible officer and there being no circumstances or material to suspect that the Magistrate had any animus against the accused or was in any way interested for fabricating a dying declaration,

question of doubt on the declaration , recorded by the Magistrate does not arise.”

17. Therefore, the moot question which is required to be considered is whether the endorsement of the doctor recording the condition on the dying declaration itself is a must in every case and the answer has to be in negative. Therefore, keeping in mind the guidelines laid down by the Hon'ble Apex Court as stated above, the basic underlying idea that when the dying declaration is recorded the victim must be conscious and in a fit condition to make such statement freely and voluntarily has to be ascertained. Normally, the endorsement of the doctor is obtained as regards the condition of the patient/victim. In other words, the dying declaration can be relied on if it does not suffer any basic infirmity and inspiring confidence. Again for that matter the test as to whether the dying declaration is freely and

voluntarily made in conscious and fit state of condition, the endorsement of the doctor is looked for which will certainly give the reliability and confidence about the dying declaration but at the same time if such an endorsement is not in the dying declaration itself it cannot be discarded taking a hypertechnical view. The ultimate object for the purpose of dying declaration and the safeguard provided by way of guidelines by the Hon'ble Apex Court in order to make it reliable are required to be considered. The endorsement of the doctor recording condition of the patient is one of such safeguards and if such an endorsement is to be found in the form of history in the medical case papers when the patient has stated before the doctor or the endorsement is made on the yadi coupled with the fact that the Executive Magistrate who has recorded the dying declaration is examined corroborating the medical evidence in the form of case history recorded by the doctor and also the deposition of the doctor would be

sufficient and not recording endorsement of the dying declaration should not be viewed with hypertechnicality.

18. Therefore, this point canvassed by the learned advocate has no merit and cannot be accepted in view of the observation of the Hon'ble Apex Court. Though the submissions have been made that it was a case of suicide as it was sought to be contended before the trial Court, in view of the material and evidence on record and as discussed by the trial Court, the theory of suicide has rightly not been accepted. Further the theory of suicide cannot be accepted in view of the fact that there are more than one dying declaration i.e. first when the deceased herself while giving history disclosed to Dr. Modi who recorded in the case paper. This the victim gives the first oral dying declaration to the doctor who is a medical Officer who had treated her and had been also examined PW-1 at Exh. 113. The case papers are also produced by the prosecution

which includes the case history given by the victim herself and recorded by Dr. Modi who had treated her. Another dying declaration is before the police and PW-2 Kalaji Mangalji at Exh. 17 is Headconstable who recorded the preliminary statement of the victim where the victim Sahanazbanu is said to have stated that her husband set her ablaze. Thereafter, again the victim Sahanazbanu is said to have talked to her sister-in-law Sahanazbani Liyakatali Pathan (Babi) and finally her dying declaration has been recorded by the Executive Magistrate Baldevbhai Patel who has been examined as PW-10 at Exh. 35. Baldevbhai Rambhai Patel, Executive Magistrate, PW-10 at Exh. 35 in his deposition has clearly deposed about having recorded the dying declaration of the victim which is at Exh. 36 and has also stated and clarified that she was conscious and in a fit state of condition to give any declaration. He has also stated that he had taken the sense of the doctor about th condition of the patient. As discussed above, there is also

an endorsement in the medical case paper as well as there is an endorsement on the yadi. Therefore, merely, because he has not taken an endorsement of the doctor on the dying declaration itself would not make it unreliable. This witness has also explained that he has waited for the doctor and as the doctor was busy after taking sense about the condition of the patient he proceeded to record the dying declaration. His deposition is corroborated by medical evidence as discussed above wherein the doctor has made endorsement that the patient is conscious. Therefore, as there is consistent say of the victim herself in the form of dying declaration to three different persons including the Executive Magistrate, the theory of the accident cannot be readily accepted. Moreover, a close scrutiny of the material and evidence on record particularly the postmortem report at Exh. 30 referring to the injuries column No. 7 specifically referring to the fact that scalp and heirs are burnt which is also indicative of the

fact that it was not a case of suicide. A useful reference can be made to Book of Dr. Modi's Medical Jurispurudence and Toxicology, 23rd Edition. There is a specific reference to this aspect suggesting that if the hairs are burnt it would indicate the fact that it is poured and that rules out the possibility of accident inasmuch as in case of accident which would catch fire from bottom to top and hairs would not be burnt or will not have smell of kerosene. Therefore, the submission made by the learned advocate for the accused that it could be a case of suicide cannot be accepted at all.

18. In view of the above discussion and the reasoning given in the impugned judgement recording the conviction of the accused for offence under Sections 302 and 498A of the Indian Penal Code, we are of the opinion that it does not call for interference with the order passed by the trial Court and the present appeal deserves to be dismissed. The judgement and order passed by the learned trial Judge recording the

conviction of the appellant accused under Sections 302 and 498A of the Indian Penal Code is hereby confirmed. Similarly, the acquittal of accused No. 2 for both the aforesaid offences is also hereby confirmed. The appeal stands hereby dismissed.

(A.M. KAPADIA, J)

(R.H. SHUKLA, J)

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